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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. [redacted] 56

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

REPLY BRIEF.

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No. 929.

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

REPLY BRIEF.

MAY IT PLEASE THE COURT:

The brief of Respondents in opposition to this petition discusses the merits of the case, and finds no basis for an argument that the writ should be denied.

In reply it is not possible to follow the order of Respondents' brief, and it is unnecessary here to repeat what has been said in Petitioners' original brief. Statements by Respondents regarding the Illinois Anti-Injunction Act of 1925 are immaterial (Respondents' Brief, pp. 11, 22), because this Court must accept the state court's restrictive construction of that act; but to avoid a misunderstanding, it must again be stated that the Illinois act omitted the restrictive provisions of the Clayton Act.

The Issue.

This case involves an undenied restraint upon peaceful speech and peaceful assembly. This restraint which is imposed by injunctions of state courts is sought to be justified on the grounds (1) that the objective of changing standards in a non-union shop, by action of union non-employees, is unlawful under the law of Illinois; (2) that this Court is under a duty to apply the Illinois law in this case, and that, under that law the objective being unlawful, all acts of peaceful speech or assembly in aid of such objective are unlawful; (3) that if acts of violence are employed in aid of a lawful objective the whole plan becomes unlawful, and all peaceful acts in connection therewith may be enjoined; (4) that the harmonizing of constitutional rights requires the protection of the employer from injury by picketing or solicitation conducted by persons having no employee relation with him; and (5) that the protection of speech and assembly under the Fourteenth Amendment applies only to restraint by the legislative department of the state government.

Counsel for Respondents state that: "This case involves solely a question as to whether or not a trade union can compel plant unionization against the will and desires of the employees," (Brief, p. 12), and allege without basis that the unionization of the shop could have no relation to wages, hours, working conditions or representation of employees. (Brief, p. 4.)

The issue in fact resolves itself into the single question as to whether a state court may by injunction restrain or in fact forbid peaceful speech and peaceful assembly with respect to a labor dispute where there is no proximate relation of employer and employee.

Petitioners contend that the Fourteenth Amendment protects their right freely to speak and to assemble in

peaceful effort to "make their combination extend beyond one shop," even though there is no proximate relation of employer and employee between the parties. Respondents deny such protection.

Validity and Effect of Judicial Restraint.

Although they allege that the restraints here imposed by injunction are within the construction of the Fourteenth Amendment by this Court, Respondents' primary argument is that the Fourteenth Amendment does not protect freedom of speech and of assembly against state judicial restraint (Respondents' Brief, pp. 20-22), and that it is the duty of this Court to follow state judicial decisions as to the common law of the state, even though such decisions restrict rights guaranteed by the Fourteenth Amendment. (Respondents' Brief, pp. 14, 16, 18.) This argument is sufficiently discussed in Petitioners' original brief, pages 28-33.

In addition, however, it is proper to discuss certain distinctions between restraint of a legislative character and judicial restraint. This Court has recently said that legislative restraints should be tested on their face and not by the facts of particular cases arising thereunder. The Court said in *Thornhill* v. *State of Alabama*, 60 S. Ct. 736, 84 L. Ed. 659, 663:

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. * * * It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."

The present case involves an injunction issued in a specific case, but presents also the issue as to whether certain clauses of the injunction are void on their face, without consideration of the facts. The permanent injunction is clearly capable of such consideration, because it is based

upon a finding that peaceful picketing and peaceful persuasion are unlawful and, that the employer is entitled to obtain a judicial restraint where a proximate relation of employees and employer is absent (R. 37).

Respondents seek to minimize the effect of the statement in the decree for permanent injunction that "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i. e.*, where there is not a proximate relation of employer and employee)" and that "the appellants have *therefore* maintained their complaint," (R. 37) by quoting the language in part and by omitting the word "therefore" (Respondents' Brief, p. 4). That the decisions in this case and in the Meadowmoor case were based on the absence of an employer-employee relation rather than on alleged violence or untruth is made clear by an explanatory statement in the recent case of *Ellingsen* v. *Milk Drivers' Union*, quoted later in this brief.

Respondents suggest that the statutes and ordinances which have been held invalid have restrained speech and assembly more generally than the injunction in the present case. (Respondents' Brief, p. 14.) But the terms of the injunction here involved are much more restrictive than the terms of such ordinances and statutes.

It is conceded by Respondents that if the various prohibitions in the injunction issued by the Illinois Court were contained in a legislative act, it would on its face be invalid. Can it be said that the courts can violate the Fourteenth Amendment and the legislature may not? This would grant immunity to one branch of the government and destroy the effectiveness of the Fourteenth Amendment.

Judicial restraint is in fact much more effective than legislative restraint. It is true that a separate injunction is required in each case; but the Supreme Court of Illinois has in the present case prescribed the pattern of such an injunction, and has made it the duty of trial courts to issue

such an injunction upon a showing of absence of an employer-employee relationship. That this is the position of the Supreme Court of Illinois is made certain by the explanatory statement of that court in the recent *Ellingsen* case, quoted later in this brief.

The restraint by injunction is under this view a matter of right, and the inferior courts have no discretion. The Appellate Courts of Illinois have necessarily applied the law as established by the state Supreme Court. *Hendrickson Motor Truck Co.* v. *International Association of Machinists,* 301 Ill. App. 608; *Jaffe* v. *Auto Mechanics Local,* 301 Ill. App. 624. And when state law governs, the principles of this case and of the *Meadowmoor* case, as explained in the *Ellingsen* case, will be controlling in the federal courts if the present decision stands. *Lake Valley Farm Products* v. *Milk Wagon Drivers' Union,* 108 Fed. (2d) 436, 443, in which writ of certiorari has been granted by this Court (No. 770).

Since the original opinion of the Supreme Court of Illinois in the present case (June 19, 1939), injunctions substantially identical with that here involved have been obtained in practically every labor controversy in Illinois where the proximate relation of employer and employee was absent; and a conservative estimate of the number of such injunctions would indicate at least one hundred in the state as a whole, and at least fifty of this number in Cook County.

With reference to restraint by injunction, it should also be indicated that violations are punishable by summary proceedings for contempt, and that more effective enforcement is thus possible, without the necessity of according the accused the ordinary safeguards of the judicial process.

Freedom of Speech and of Assembly Are Not Limited to Employer and Employee in a Labor Dispute.

The permanent injunction issued by the Appellate Court in this case was based on a statement that it and the Supreme Court of Illinois had held that "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i. e.*, where there is not a proximate relation of employees and employer.)" (R. 37.)

The opinions in the state Appellate and Supreme Courts both make it clear that peaceful speech and assembly may not be restrained where there is an employer-employee relationship even though there may also be violence or untruth (298 Ill. App. 63, 372 Ill. 91; R. 26; and see quotation on page 26 of original brief); and that such speech and assembly are unlawful and may be restrained where there is not an employer-employee relationship even though there may be no violence or untruth.

In reply, it is sufficient to call attention to the contrary view of this Court in *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, and *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468. Relevant quotations from these cases appear in Petitioners' original brief, pp. 24, 30-31. The statement in the *Senn* case has recently been approved by this Court in *Thornhill* v. *State of Alabama,* 60 S. Ct. 736, 745, 84 L. Ed. 659, 667. And attention should again be called to the fact that in the *Senn* case this Court explicitly said that neither Senn nor any of his employees were members of or had any contractual relation with the union.

Respondents make no effort to distinguish the Senn case but say that the *Tri-City Council* case is distinguishable because the dispute was in a small community and the members of the trade union were once employees and were prospective future employees. (Respondents' Brief, p.

16.) These statements are not supported by the decision, and run directly counter to the Court's statement that "employees must make their combination extend beyond one shop." Relevant portions of the opinion in this case may be found at page 24 of Petitioners' original brief. And in *Carlson* v. *State of California,* 60 S. Ct. 746, 84 L. Ed. 668, this Court recognizes not only the rights of union non-employees but also the rights of "disinterested persons (who might be hired to carry signs)." This Court has recently said that: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Thornhill* v. *State of Alabama,* 60 S. Ct. 736; 84 L. Ed. 659. And this freedom of discussion is not limited to those having a proximate relation of employer and employee.

Injury to the employer is the primary basis in the state court for enjoining free speech and free assembly where there is no employer-employee relation. It is conceded that, under a valid Illinois statute, the employer must suffer the injury from free speech and free assembly where there is an employer-employee relation, and that this applies to all peaceful action, even though there may have been acts of force or violence for which a remedy exists. (See quotation on page 26 of original brief.)

Here, as in the *Carlson* case, "the carrying of signs and banners * * * is a natural and appropriate means of conveying information on matters of public concern"; and here, as in the *Senn* and *Schneider* cases, the peaceful exercise of freedom of speech and of assembly are not limited by the fact that there may be incidental injury to others. Relevant quotations from these cases appear at pages 21 and 25 of Petitioners' original brief. The view of this Court has been clearly stated in the recent case of *Thorn-*

hill v. *State of Alabama*, 60 S. Ct. 736, 745; 84 L. Ed. 659, 667:

> "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportuity to test the merits of ideas by competition for acceptance in the market of public opinion."

Allegations of Violence Do Not Support Restraints on Peaceful Speech and Assembly.

In the Supreme Court of Illinois the only issue in review was that as to the validity of paragraphs (a), (b), (c) and (d) of the injunction. (R. 14, 38.) It was contended there and is contended here by Petitioners that such paragraphs are void on their face, in that they enjoin peaceful speech and assembly not as parts of a scheme but as acts separate and apart from acts of violence. If such provisions can be sustained because associated with restraints upon acts of violence, freedom of speech and of press are dependent upon the form of an injunction.

But attention must also be called to the fact that elements of force and of falsity and maliciousness are exaggerated by Respondents. As indicated in the petition, facts which are directly alleged are admitted by the motion to dismiss in this case, but conclusions of the pleader

are not admitted. (Petition, p. 3.) It is admitted that members of the union were not employees of respondent Swing and that signs carried by pickets bore the words: "This Beauty Shop is unfair to Organized Labor." That they were false and malicious is a conclusion of the pleader based upon the words quoted above and upon the fact that such words were used by persons who were not employees of respondent Swing. Respondents make the obviously incorrect statement that clause (c) of the injunctional order only restrains the quoted legend (Respondents' Brief, p. 6), and assert that this statement was libelous. (Respondents' Brief, pp. 5, 17, 18.) The ground for this statement is the absence of an employee-employer relation, Respondents saying that, should such a relation be established, "the present libelous statements would thereupon become statements of truth." (Respondents' Brief, p. 17.) This is merely another way of saying that there is not freedom of speech as to unfairness unless an employer-employee relation exists. The malice, libel and untruth arise, not because of the statement, but because of the relationship of the parties. But this Court has taken the view that freedom of speech equally applies to the employee and the non-employee.

Attention should again be called to the fact that the injunctions here in issue forbid all future statements, irrespective of their truth or falsity. This matter is discussed in the original brief, pages 19-22.

Throughout the opinion of the Supreme Court of Illinois in this case is implicit the theory that libel, force and untruth are to be construed as parts of any labor controversy in which an employer may suffer injury from action by others than his employees. The injury itself under such conditions is regarded as the result of force and libel. This view is more explicitly stated in a later opinion of that court. The opinion in the present case is largely

based on *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers' Union*, 371 Ill. 377, in which there was detailed testimony as to violence. In the recent case of *Ellingsen* v. *Milk Wagon Drivers' Union* (April 10, 1940), as yet unreported, the Supreme Court of Illinois said as to the *Meadowmoor* case:

> "In that case there was some evidence of violence, but an examination of the opinion will disclose that the issue of violence was not the turning point of the decision."

With respect to the issue here involved the Court said in the *Ellingsen* case:

> "In the *Meadowmoor case* the question of the right of free speech, which is earnestly urged here, was considered. Relying upon cases of the Federal courts, it was held that the constitution does not protect in the use of words which may have all of the effects of force uttered for the purpose of injuring the business of another (*Gompers* v. *Buck's Stove and Range Co.* 221 U. S. 418, 35 L. Ed. 796); and thus, even though the picketing be peaceful, if, in accordance with a concerted purpose to injure the business of another, words are used which, through fear or disturbance amount to force, such acts are subject to restriction by injunction."

It is made clear that the words would not be subject to injunctional restraint if uttered by an employee. Here again the absence of an employer-employee relation is the basis of restraint, and force is held to be constructively an element in peaceful action, where that relationship does not exist. The right to a permanent injunction in the present case is explicitly based upon the absence of such a relationship (R. 38); and this basis is confirmed by the Supreme Court of Illinois in granting motion to dismiss writ of error on the ground that its opinion on previous appeal settled all the rights of the parties. (R. 45-46.)

Even though certain elements of violence may have been admitted by the motion to dismiss, and even though these

elements should be regarded as a basis for the permanent injunction entered by the state Appellate Court and confirmed by the state Supreme Court, there is still no basis for an injunction restraining peaceful exercise of free speech and free assembly. Clearly the first four paragraphs of the injunction impose such restraint, and clearly they are distinct and separate restraints, not dependent upon those against violence. The Supreme Court of Illinois has found no difficulty in separating acts of peaceful persuasion from [illegible] of violence where there is an employer-employee rela[illegible] (Original Brief, p. 26), and the difficulty of separation is no greater where this relationship is absent, unless this Court is to adopt the view of the Supreme Court of Illinois, that the absence of such relationship in itself constitutes libel and force. And in the *Tri-City Central Trades Council* case this Court found no difficulty in separating lawful from unlawful acts where there was no employer-employee relation. (Petitioners' Brief, pp. 24, 31.)

Respectfully submitted,

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